

The opinion in support of the decision being  
entered today is not binding precedent of the Board.

Paper 63

Filed by: Interference Trial Section Motions Panel  
Mail Stop Interference  
P.O. Box 1450  
Alexandria Va 22313-1450  
Tel: 703-308-9797  
Fax: 703-305-0942

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

FREDERICK W. **SIELING**

**Junior Party,**  
(Patent 6,038,827),

v.

LEONARD D. **McCUMBER**, RANDAL J. JOLITZ  
and VIRGINIA K. COLEMAN

**Senior Party,**  
(Application 08/933,160).

---

Patent Interference No. 105,032

---

Before: SCHAFER, MOORE and POTEATE, Administrative Patent Judges.  
SCHAFER, Administrative Patent Judge.

**JUDGMENT-RULE 610**

This interference is between Sieling Patent 6,038,827 and McCumber Application 08/933,160. A schedule was set for filing preliminary motions. Paper 17. The parties were provided the opportunity to cross-examine all witnesses. Paper 2, § 35. An oral hearing on the

preliminary motions was held April 27, 2004. The motions have been decided by this panel as follows (Paper 61):

1. Sieling's Preliminary Motion 1 (Paper 22), seeking a judgment that there is no interference-in-fact between any of Sieling's and McCumber's involved claims, was denied;

2. Sieling's Preliminary Motion 2 (Paper 26), seeking a holding that McCumber's Claims 105, 109 and 116-118 are unpatentable over certain prior art, was denied as to Claim 105 and granted with respect to Claims 109 and 116-118;

3. Sieling's Preliminary Motion 3 (Paper 27), seeking a judgment that McCumber Claim 120 is not supported by a written description in McCumber's original disclosure as required by 35 U.S.C. § 112, ¶ 1, was denied;

4. Sieling's Preliminary Motion 4 (Paper 28), seeking to designate Sieling's Claims 13 and 14 as not corresponding to the count, was denied; and

5. McCumber's Preliminary Motion 1 (Paper 31), seeking to substitute a different count, was denied.

Having decided the preliminary motions, it is now appropriate to enter the priority phase of this interference. Sieling as the junior party has the burden of proof on the issue of priority. 37 CFR § 1.657. Sieling's Preliminary Statement (Paper 25) alleges an earliest date of invention of August 11, 1998. This is subsequent to the September 17, 1997, filing date of McCumber's involved application. Since Sieling can not prove a date of invention earlier than the date alleged in the preliminary statement (37 CFR § 1.629), Sieling can not prevail on priority. As the parties have been given a full opportunity to present evidence supporting their respective motions and elicit testimony during the preliminary motions phase by cross-examination of the opponent's witnesses, and a panel of this board has issued a decision on their motions, there is no reason to set an additional testimony period and no reason to enter an order to show cause.

## **ORDER**

It is

**ORDERED** that judgment on priority as to Count 1, the only count in this interference, is awarded against junior party FREDERICK W. SIELING;

**FURTHER ORDERED** that junior party, FREDERICK W. SIELING, is not entitled to a patent containing Claims 1-18 of Patent 6,038,827 which correspond to Count 1;

**FURTHER ORDERED** that senior party, LEONARD D. McCUMBER, RANDAL J. JOLITZ and VIRGINIA K. COLEMAN, is not entitled to a patent claiming Claims 109 and 116-118 of Application 08/933,160;

**FURTHER ORDERED** that if there is a settlement agreement and it has not already been filed, attention is directed to 35 U.S.C. § 135(c) and 37 CFR § 1.661;

**FURTHER ORDERED** that any request for reconsideration of this judgment or the decision on preliminary motions be filed within one month of this decision; and

**FURTHER ORDERED** that a copy of this judgment and the Decision on Preliminary Motions (Paper 62) be given appropriate paper numbers and entered into the file records of Patent 6,038,827 and Application 08/933,160.

RICHARD E. SCHAFFER  
Administrative Patent Judge

JAMES T. MOORE  
Administrative Patent Judge

LINDA R. POTEATE  
Administrative Patent Judge

)  
)  
)  
)  
)  
)  
)  
) BOARD OF PATENT  
) APPEALS AND  
) INTERFERENCES  
)  
)  
)  
)  
)  
)

cc (via First Class Mail):

Attorney for SIELING:

Paul J. Esatto, Jr., Esq.  
Philip Y. Braginsky, Esq.  
SCULLY, SCOTT, MURPHY & PRESSER  
400 Garden City Plaza  
Garden City, NY 11530

Tel: 516-742-4343  
Fax: 516-742-4366

Attorney for McCUMBER:

Christopher R. Benson, Esq.  
Steven L. Highlander, Esq.  
FULBRIGHT & JAWORSKI  
2400 One American Center  
600 Congress Avenue  
Austin, TX 78701

Tel: 512-536-3184  
Fax: 512-536-4598